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Security Title Company, A Corporation as Trustee, and Prudential Federal Saving & Loan Association v. Payless Builders Supply, a Utah Corporation, Ellis J. Robinson and Eliza S. Robinson and Mount Olympus Cove, Breitling Brothers Construction Company, Security Title Co., William R. Wallace, Utah Sand & Gravel Products Corporation, Max G. Framptom, Murray State Bank, R. W. Frank & Co and United States of America : Brief of Plaintiffs and Respondents

IN THE SUPREME COURT
of the
STATE OF UTAH

SECURITY TITLE COMPANY, a corporation as Trustee, and PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation,

Plaintiffs and Respondents,

vs.

PAYLESS BUILDERS SUPPLY, a Utah corporation, ELLIS J. ROBINSON and ELIZA S. ROBINSON, his wife,

Defendants and Appellants,

MOUNT OLYMPUS COVE, a Utah corporation; BREITLING BROS. CONSTRUCTION CO., a corporation; SECURITY TITLE COMPANY, a corporation; UTAH SAND & GRAVEL PRODUCTS CORPORATION, a corporation; MAX G. FRAMPTON and MARY L. FRAMPTON, his wife; MURRAY STATE BANK, a corporation; R. W. FRANK & CO., a corporation; UNITED STATES OF AMERICA; WILLIAM R. WALLACE, dba RUSS WALLACE ROOFING COMPANY,

Defendants and Respondents.

CASE No.
10269

BRIEF OF PLAINTIFFS AND RESPONDENTS

Appeal from the Judgment entered by the Third District Court, State of Utah,
Honorable Stewart M. Hanson, Judge

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BRIEF OF PLAINTIFFS AND RESPONDENTS

STATEMENT OF FACTS

The Respondents Security Title Company and Prudential Federal Savings & Loan Association submit the following statement of facts in supplement

to those set out in Appellants' brief. The Respondent Prudential Federal Savings & Loan Association, a corporation, will be referred to in this brief as Respondents, or Prudential, and Respondent Security Title Company will be referred to as Respondents, or Security. The Appellants Pay Less Builders Supply, a corporation, and Ellis J. Robinson and Eliza S. Robinson, his wife, will be referred to as Appellants, or Pay Less Builders Supply, and Ellis J. Robinson and Eliza S. Robinson respectively.

The facts of this case are set forth in Respondent's complaint, Appellants' motion to dismiss and answer, the answers, counterclaims and cross-claims of the other defendants in the action, pre-trial order, transcript, Findings of Fact, Conclusions of Law and Decree of Foreclosure, together with order of sale, and the return of sale by the Sheriff of Salt Lake County.

On June 25, 1962, Respondent Prudential made a loan to Appellants in the sum of $27,500.00 (R.6, 74 Ex. P. 2) To evidence said loan on June 25, 1962 all Appellants made, executed and delivered to Respondent Prudential a promissory note for the sum of $27,500.00, a true copy of which is attached to Respondent's complaint. (R. 6, 74 Ex. P. 2) The note provides for the payment of interest at the rate of 6% per annum on the unpaid balance until paid, and principal and interest to be paid in monthly installments of $232.07 each, commenc-

ing on June 1, 1963. The note contains the following provisions:

> "If default be made in the payment of any installment required by this note, or in the performance of any covenant or promise of the undersigned contained in the trust deed securing the payment hereof, the entire principal sum and accrued interest shall at once become due, payable and collectible at the option of the holder of this note without notice to the undersigned or their successors in interest. Failure to exercise this option shall not constitute a waiver to exercise the same in the event of a subsequent default or defaults.
>
> *This note, or any payment thereunder, may be extended from time to time without in any way affecting or impairing the liability of the makers or endorsers thereof.*
>
> . . . in the event Prudential Federal Savings and Loan Association and the Trustee under deed of trust given to secure the payment hereof or either of them shall (1) determine to foreclose said deed of trust by court action, or (2) find it necessary to resort to the courts to secure protection of the security described in said deed of trust or to enforce or protect the rights of Prudential Federal Savings and Loan Association hereunder or under said deed of trust, or (3) be involved in court action involving or affecting said deed of trust, the security given thereunder, or the indebtedness secured thereby, the Trustor agrees to pay all costs and expenses incurred therein and reasonable compensation for the attorneys representing Prudential Federal Savings and Loan Association and the Trustee, or either of them.

> This note is secured by a real estate deed of trust and is given in consideration of a loan by the payee hereof to the undersigned." (R. 6, 74 P. Ex. 2)

The original promissory note was identified, offered and accepted into evidence by the trial court at pretrial without exception by counsel for appellants. (R. 6, 74 Ex. P. 2).

On the same date, June 25, 1962, to secure payment of the promissory note and for the benefit of Respondent Prudential as Beneficiary, Appellant Pay Less Builders Supply executed and delivered to Respondent, Security as Trustee, a deed of trust for the sum of $27,500.00, a true copy of which is attached to Respondents' complaint. (R. 7-8, 74 P. Ex. 1) Said deed of trust was duly acknowledged and certified so as to be entitled to record, and was recorded on June 27, 1962 in Book 1937, page 174, records of the Salt Lake County Recorder, State of Utah, and when recorded became a good and sufficient paramount first lien upon the premises situated in Salt Lake County, State of Utah, consisting of a house and lot described as follows:

> Lot 15, MT. OLYMPUS COVE, according to the plat thereof, recorded in the office of the County Recorder of said County.

The original deed of trust was identified, offered and accepted by the trial court at pretrial, again without protest from counsel for Appellants. (R. 74,

Ex. P. 1), The deed of trust provides among other things:

> "A. To protect the security of this Deed of Trust, Trustor agrees:
>
> 1. To keep said property in good condition and repair; . . . not to commit or permit waste thereon; . . .
>
> 3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any action or proceeding in which Beneficiary or Trustee may appear.
>
> 4. To pay before delinquent all taxes and assessments affecting said property; and all encumbrances, charges and liens, with interest and penalties, on said property or any part thereof, which appear to be or are prior or superior hereto.
>
> In addition to the monthly payments as provided in said note, the Trustor agrees to pay to the Beneficiary, upon the same day each month, budget payments estimated to equal one-twelfth of the annual taxes and insurance premiums; . . .
>
> 7. Should Trustor fail to make any payment or do any act herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: *make or do the same in such manner and to such extent as*

either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the right or power of Beneficiary or Trustee; . . . *and, in exercising any such powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable fees.*

B. It is mutually agreed that:

. . .

5. *As additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect the rents, issues and profits of said property,* reserving unto Trustor the right prior to any default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents, issues and profits as they become due and payable . . .

13. In the event the Beneficiary and the Trustee or either of them shall (a) determine to foreclose this Deed of Trust by court action, or (b) find it necessary to resort to the courts to secure protection of the security given hereunder or to enforce or protect the rights hereunder of the Beneficiary, *the Trustor agrees to pay all costs and expenses incurred therein and reasonable compensations for the attorneys representing the Beneficiary and the Trustee, or either of them.*"

Appellants failed to pay the principal and interest payments of $232.07 per month which became

due under said promissory note for the months of June through December 1963, and the month of January, 1964, when this action was commenced. Appellants also failed, refused and neglected to pay for each of said months the further amount of $46.93 per month, the amount required to be paid under said deed of trust for taxes, fire and other hazard insurance premiums. (R. 2, 77, 130). *In fact, Appellants have never made any payments on said promissory note or deed of trust for principal, interest, taxes and fire insurance premiums since June, 1963, when said payments were to commence.* (R. 77, 130). By reason of such defaults, Respondents elected to declare the unpaid balance of said note and deed of trust due and payable, and elected to foreclose said deed of trust in the manner provided by law for the foreclosure of mortgages on real property, as permitted by Sec. 57-1-23, U.C.A. 1953 as amended.

At the time this foreclosure action was commenced the Preliminary Title Report, which was identified, offered and accepted by the Court at Pretrial as Respondents Exhibit 3 (R. 74, P. Ex. 3) without exception by counsel for Appellants showed the above presmises, in addition to Respondent's deed of trust loan, was encumbered by numerous liens, including a Federal tax lien, claimed by defendants amounting to a total sum of $31,548.86.

Defendants who claimed liens prior to the lien

of Respondent's deed of trust included the following:

United States of America, Federal tax lien (R. 33-34, 79, 74 P. Ex. 3)	$5,075.04
William R. Wallace, dba Russ Wallace Roofing Co., Judgment lien (R. 15-16, 81, 74, P. Ex. 3)	1,389.50
R. W. Frank and Co., Judgment Lien (R. 13-14, 82, 74, P. Ex. 3)	9,031.73
Murray State Bank, Judgment Lien (R. 10-11, 74, P. Ex. 3)	3,087.50
Utah Sand and Gravel, Judgment Lien (R. 9, 81-82, 74, P. Ex. 3)	658.42
Breitling Bros. Construction Co., mortgage lien, (R. 18-22, 80, 74 P. Ex. 3)	855.00

Other defendants who claimed liens on the said premises without claiming their liens were prior to the Respondent's deed of trust are as follows:

Mt. Olympus Cove, mortgage lien (R. 28-32, 79, 74, P. Ex. 3)	$6,000.00
Mt. Olympus Cove, mortgage lien (R. 28-32, 80, 74, P. Ex. 3)	2,400.00
Max G. Frampton and Mary L. Frampton, Judgment Lien (R. 74, P. Ex. 3)	838.32
Security Title Company as Assignee of judgment in favor of Pioneer Wholesale Supply Co. (R. 74, P. Ex. 3)	2,213.35
Total	$31,548.86

Appellants in their Sixth Defense of their answer claimed the tax lien of the United States of America was prior to Respondent's deed of trust lien insofar as it secured payment of Respondents' attorney's fees and costs. (R. 27)

On February 10, 1964, Appellants filed a motion in the District Court of Salt Lake County to dismiss Respondents' complaint because of Respondents' failure to follow statutory remedies provided by the Utah Code. This motion was properly noticed for hearing by Respondents before Third District Judge Aldon J. Anderson on February 25, 1964, and was denied on the same date. (R. 12, 17, 18).

On June 29, 1964, Respondents filed their Notice of Readiness for Trial. (R. 73). Third District Judge Stewart M. Hanson set the case for pretrial on July 8, 1964. (R. 73). On July 8, 1964, the pretrial hearing was continued by Judge Hanson, upon the oral motion of John Elwood Dennett, attorney for Appellants, over the objections of Respondents and the other defendants' attorneys, in order to give Appellants a reasonable time to amend their answer and to file a third-party claim and counterclaim:

> "on the proposition that the plaintiff has illegally entered into the premises and purportedly sold the same under a conditional sales contract without knowledge and consent of the defendants, or any of them; that the plaintiffs collected payments in rents for which they have failed to account; and a third-party claim and counterclaim on the grounds that

the property was advantageously sold, tentatively sold, and that the sale failed because of malicious interference of the plaintiff, Prudential, in the proposed transaction, publishing facts which they were not entitled to publish, all of which frustrated the sale to the defendants' damage, in excess of the amount claimed due and owing, to the defendants' damage.

We would like to file that counterclaim and third party claim, naming those who maliciously interfered, and also make a demand for jury trial on the issues." (R. 126)

On September 10, 1964, this case was for the *sceond time set for pretrial* hearing before Third District Judge Stewart M. Hanson upon the request of Respondents' attorney. All parties were present at this pretrial hearing, either in person or by counsel, except defendants Security Title Company, Max G. Frampton and Mary L. Frampton, who had failed to file an answer or otherwise plead to Respondents' complaint and whose defaults had been duly entered, (R.70), and Murray State Bank which filed a disclaimer in the action previous to pretrial. (R. 71).

At the September 10 pretrial hearing, discusisons were held on all issues and matters raised by the pleadings on file in this case. Statements and admissions were made by attorneys present on all issues before Third District Judge Stewart M. Hanson (R. 75-90), including the amounts Respondent Prudential claimed were due and owing on its pro-

missory note and deed of trust (R. 77, 78, 130), and all amounts claimed due and owing by Appellants to the other defendants in the case on their notes, mortgages and judgments. (R. 78-90). The priority of lien of Respondent's deed of trust over the claimed liens of other defendants in the case were fully examined by Judge Hanson, including the tax lien of the United States of America. (R. 76-90, 125). In addition, the statutory remedy pursued by Respondent in foreclosing its deed of trust in the manner provided by law for foreclosure on real property permitted by Sec. 57-1-23, U.C.A. 1953, was discussed and examined by Judge Hanson and counsel present (R. 90, 126-130), as were other matter raised by Respondents' complaint and the answer, counterclaims and crossclaims of the defendants in the action, including Appellants.

From the examination and the admissions and stipulations made by attorneys present at pretrial, Judge Hanson found there were no genuine issues as to any material facts between the Appellants and Respondents and the other parties to the case as to the balance due and owing to the Respondent Prudential from Appellants for principal, interest and costs on Respondent's promissory note, and to the amounts due and owing the Respondent Prudential from the Appellant Pay Less Builders Supply, for taxes due Respondent under the deed of trust.

At pretrial counsel for Appellants did contend however that:

> (1) Respondent's deed of trust was not a mortgage and therefore could not be foreclosed as a real estate mortgage. (R. 125)
>
> (2) The attorney's fees requested by Respondents in the amount of $2,500.00 were unreasonable, and that the question should be submitted to a jury (R. 126). (It is interesting to note that this was the first time this question had been raised in the proceedings and the request for jury trial was made orally).
>
> (3) *The cost of Respondent's preliminary title report in the sum of $35.00 which was offered and accepted by the court at pretrial without exception from Appellants' counsel, was unreasonable.* (R. 74, P. Ex. 3, 131).

On the grounds that there was no genuine issue as to any material fact between Respondents and Appellants, and that Respondents were entitled to judgment as a matter of law, the court solicited a motion for summary judgment from counsel for Respondents, which was made and granted.

At the pretrial hearing on September 10, 1964, Appellants renewed their request for leave of the court to file the same identical counterclaim and thirdparty claim that they had asked leave of court to file at the first pretrial hearing on July 8, 1964. (R. 125, 126). See pages 9, 10, supra.

The court denied Appellants' motion, stating:

> *"THE COURT: Let the record show that this motion made by defendants through their counsel is denied by the Court upon the grounds and for the reasons that this matter was set for July 8, 1964, at the hour of 1:30 o'clock P.M. for pretrial hearing and was continued at the request of John Elwood Dennett by the Court, over the objection of the other parties, with the understanding that the matters now requested by Mr. Dennett would be done within a reasonable time."* (R. 126)

The court further denied Appellants' motion on the ground that Respondents had stipulated that Appellants would not be precluded from filing a separate action at a subsequent time on such claim of Appellants (R. 130), and Respondent Prudential's attorney would accept service of summons and complaint in such lawsuit.

Counsel for Respondents at pretrial testified and was cross examined by counsel for Appellants on the question of reasonableness of attorney's fees, amounts due and owing to Respondents from Appellants, why a judicial foreclosure was filed and other matters. (R. 125-131).

From the testimony heard, admissions of counsel, and the proofs examined and the arguments of counsel for the parties at pretrial, the court made and entered Findings of Fact, Conclusions of Law and its Decree of Foreclosure, which were filed on October 26, 1964. (R. 75-90).

On October 27, 1964, notice of entry of Findings of Fact, Conclusions of Law and Decree of Foreclosure were mailed by Respondents to the Appellants. Appellants made no objections or motions to the court to make additional findings or to alter or amend the judgment or for a new trial.

On November 3, 1964, the Clerk of the District Court for Salt Lake County issued its Order of Sale ordering the Sheriff of Salt Lake County, State of Utah, to notice for sale and to sell the premises hereinabove described and to apply the proceeds of said sale as in said judgment and decree directed. (R. 101). The Sheriff of Salt Lake County did advertise the premises for sale as required by the laws of the State of Utah in foreclosure of real estate mortgages and scheduled said property to be sold at Sheriff's Sale on Tuesday, December 8, 1964, at the time and place advertised. (R. 111).

On November 25, 1964, the Appellants filed their notice of appeal, the last day it could be filed under the Utah Rules.

Although it does not appear in the record, Respondent's attorney on December 7, 1964, asked Appellants' attorney if he was going to object to the Sheriff's Sale scheduled for December 8, 1964, and Appellants' attorney replied that he had no objection to the sale and if the sale proceeds were applied according to the Decree of Foreclosure, he would dismiss the appeal.

On December 8, 1964, the mortgaged premises were sold at Sheriff's Sale to the Respondent Prudential for the total amount of Respondent's judgment, $33,079.15. (R. 120, 121, 122).

On February 2, 1965, the Sheriff's Amended Return of Sale was filed with the Clerk of the District Court of Salt Lake County. (R. 120-123). *The return shows Respondent Prudential bid the full amount of its judgment for the mortgaged premises, and Respondents have been paid in full for their judgment, and that Respondents have no claim and make no claim of a deficiency judgment against any of the Appellants.* (R. 120, 121, 122, 123).

On November 25, 1964, Appellants filed Notice of Appeal, appealing the judgment in favor of Respondents and all judgments in favor of the cross-defendants as shown by the Findings of Fact, Conclusions of Law and Decree of Foreclosure in their entirety. (R. 100).

Upon motion of the United States of America, which was not opposed by Appellants, this court by order dated February 1, 1965, dismissed Appellants' appeal from the judgment in favor of United States of America. The motion of United States of America in paragraph 3 recites, "according to the District Court's Findings of Fact, Conclusions of Law and Decree in this case, the Government's tax priority and priority to receive distribution from the proceeds of the sale of the property, appears to be

properly founded upon Federal standards, and therefore unquestioned." (R. 115, 116).

Appellants failed to perfect their appeal from the judgment in favor of the Respondent in accordance with the Utah Rules of Civil Procedure. They have perfected their appeal only after repeated motions of Respondents and at the direction and order of this Court as follows:

1. Under Rule 75(a), URCP, Appellants' Designation of Record was to be filed on December 7, 1964 (10 days after Notice of Appeal was filed on November 25, 1964). This Court, by order dated February 1, 1965, made upon motion of Respondents, ordered Appellants to file Designation of Record on or before February 3, 1965. Appellants filed Designations of Record on February 4, 1965 (59 days late). (R. 119)

2. Under Rule 75(d), URCP, Appellants' Statement of Points was to be filed on December 7, 1964 (10 days after Notice of Appeal was filed November 25, 1964). This Court by order dated February 1, 1965, made upon motion of Respondents, ordered Appellants to file their Statement of Points on or before February 3, 1965. Appellants' Statements of Points was filed on February 4, 1965 (59 days late). (R. 118)

3. Under Rule 75(a)(1), URCP, on December 10, 1964, 15 days after Notice of Appeal was

filed November 25, 1964, Appellants were required to file their Certificate stating, "(a) that a transcript of evidence has been ordered from the court reporter, or (b) that he does not intend to rely upon said transcript." *This Certificate has never been filed.* On or about March 19, 1965, Appellants ordered the transcript from the court reporter at the insistence of this Court (approximately 99 days late).

4. Under Rule 73 (g), URCP, the Record on Appeal was to be filed on or before January 4, 1965 (40 days after Appellants filed Notice of Appeal November 25, 1964). This Court, upon motion of Respondent by order dated March 15, 1965, ordered the record to be filed on or before March 20, 1965. Record was actually field on March 22, 1965 (76 days late).

5. Under Rule 75(p), URCP, Appellants' brief was due to be filed with the Clerk of this Court on February 4, 1965 (one month after the Record on Appeal was due to be filed). Once again this Court, upon motion of Respondents, by order dated March 15, 1965, ordered Appellants to file their brief within 15 days of order (to-wit March 20, 1965). On April 5, 1965, this Court further ordered the Appellants to file their brief by 5 o'clock P.M. on April 5, 1965. Appellants filed a typewritten brief on April 6, 1965 (61 days late).

6. On April 29, 1965, Appellants filed their first printed brief (84 days late). Respondents were

not served with copies of said brief. On May 4, 1965, counsel for Respondents notified the Clerk of this Court that he was not served with two copies of Appellants' brief as required by Rules 75(p)(1). On May 10, 1965, Respondents received two copies of Appellants' printed brief (95 days late).

Appellants in the last sentence of their Statement of Facts note that there is a party in possession of the premises, consisting of a house and lot. This is true. Appellants abandoned the presmises and permitted waste to be committed upon the premises and the premises to deteriorate, in violation of their deed of trust contract with Respondent. (R. 74, P. Ex. 1). Appellants permitted windows to be broken in the house, moisture to enter the house, floors to warp and buckle, and a crack to develop in a wall of the house. To prevent further deterioration and protect its ecurity, Respondents without any objection from Appellants took possession and placed a tenant in possession of the premises as authorized by its deed of trust. (R. 74, P. Ex. 1, 129, 130). The rental agreement with said tenant provides for payment of rent, and gives to the tenant an option to purchase the premises for the sum of $34,000 (which sum includes a real estate commission), upon the condition that the premises are not redeemed by Appellants or their creditors during the statutory period of redemption which expired on June 8, 1965. (R. 120-123). In case of Redemption, Redemptioner is to receive credit for rent paid.

ARGUMENT

POINT I

WHERE A PRETRIAL CONFERENCE RESULTS IN A DETERMINATION THAT THERE ARE NO DISPUTED QUESTIONS OF FACT, AND ALL QUESTIONS OF LAW ARE DISPOSED OF BY THE PRETRIAL COURT, THE COURT HAS THE INHERENT AUTHORITL, ON MOTION, TO ENTER ITS FINAL JUDGMENT.

Since all questions of fact were resolved at the pretrial conference, and only three questions of law were posed, to-wit: (1) Appellants' right to jury trial on the question of reasonableness of Respondents' title report costs and attorney's fees, (2) Respondents' right to foreclose a deed of trust as a real estate mortgage, and (3) Appellants' right to file a third-party claim and counterclaim, and these were ruled upon by the trial court adverse to the Appellants, the case was ripe for the entry of a summary judgment, or a judgment on the pleadings.

Motion for such an order can properly be made orally, since Rule 7(b)(1) URCP requires all such applications to the court to be on written motion, "*unless made during hearing or trial.*" Moreover, pursuant to Rule 12(c), after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Hence, regardless of what

the motion is called which was made by counsel for the Respondent Prudential upon conclusion of the pretrial conference, it is apparent that nothing would be gained by requiring that a party be forced to wait ten days after a pretrial conference, at which all issues of law and fact had been resolved, before he could properly bring a motion for summary judgment before the court by giving ten days notice, whereas if the motion is considered a motion for judgment on the pleadings it could be made orally at pretrial and judgment could thereupon be entered.

The trial court acted properly in exercising its right to rule upon the remaining questions of law and enter its judgment accordingly. Merely because a motion for entry of judgment on the pleadings appears to take the form of a motion for summary judgment, it does not necessarily follow that the motion for judgment on the pleadings is a motion for summary judgment requiring compliance by the moving party with the notice provisions of Rule 56(c), URCP.

The general rule concerning the court's prerogative under such circumstances to summarily dispose of a case is summarized in 22 A.L.R.2d 599 at 609 as follows:

> "Where a pretrial conference results in a determination that there are no disputed questions of fact the case is ripe for the entry of a summary judgment in accord with the undisputed facts. (Citing authority) . . . Inherent in the pretrial process is the right of

> the court to dispose of questions of law, and where there are no issues of fact, so that only questions of law remain to be solved, and these are disposed of at a pretrial conference, judgment must necessarily follow for one party or the other."

This general rule has been accepted in the following cases:

In *Shield v. Welch*, 73 A.2d 536 (N.J. 1950), the Supreme Court of New Jersey held that where the trial court concluded a pretrial conference that action for a broker's commission resolved itself into a question of law, the trial court, upon resolving the question of law in favor of the defendant, *properly entered a summary judgment in favor of the defendant, even in the absence of any notice* by defendant of a motion therefor.

In the case of *Hinkle v. Hargens*, 81 N.W.2d 888 at 889, (S.D. 1957) the Supreme Court of South Dakota held "that if all disputed questions of fact are eliminated at the pretrial conference, the court has the inherent authority, on motion, to enter final judgment."

In *Kindley v. Williams*, 76 N.W.2d 227 at 231, the Supreme Court of South Dakota also held that "if a claim of a party is to be dismissed as a result of a pretrial, the orderly procedure is by motion, which if the facts justify, may be based upon the pretrial record. . . . Where at pretrial admissions and pleadings show that no issue of fact remains to be determined, court has power to decide questions of law and enter summary judgment."

See also 88 C.J.S., *Trials*, Sec. 17(2), p. 45, which states: "If the pretrial conference progresses to the point of eliminating all questions of fact, the court may give judgment according to the law on the facts before him."

To rule otherwise would require the trial court to ignore the stated rationale of the Utah Rules of Civil Procedure which require that they "shall be liberally construed to secure the just, *speedy* and inexpensive determination of every action." (Rule 1(a), URCP).

POINT II

A COURT AT PRETRIAL MAY GO OUTSIDE OF THE PLEADINGS TO DETERMINE IF ANY GENUINE ISSUE AS TO ANY MATERIAL FACT IS PRESENT IN DETERMINING IF A PARTY MOVING FOR A SUMMARY JUDGMENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Appellants contend at pages 4 and 5 of their brief that the judgment of the trial court should be reversed because the provisions of Rule 56(c) URCP, and the interpretations of Rule 56(c) by this Court prohibit the trial court from going outside the pleadings to determine if there is any genuine issue as to any material fact between the parties, and to determine if Respondents are entitled to judgment as a matter of law. Appellants' contentions are incorrect since:

(1) The third sentence of Rule 56(c) express-

ly authorizes the trial court to consider matters other than pleadings in determining whether any genuine issue as to any material fact exists between the parties.

(2) This Court has held that a trial court under Rule 56(c) is authorized to go beyond the pleadings in determining that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

See *Continental Bank & Trust Co. v. Cunningham*, 10 U.2d 329, 353 P.2d 168, 170, where this Court held Rule 56(c) permits excursions beyond the pleadings, and if facts discovered irrefutably disprove facts pleaded, summary judgment is appropriate on motion therefor. For other Utah cases see *Frederick May & Co. v. Dunn*, 13 U.2d 40, 368 P.2d 266; *Christensen v. Financial Service Co.*, 14 U.2d 101, 377 P.2d 1010, and *Dupler v. Yates*, 10 U.2d 251, 351 P.2d 624.

POINT III

APPELLANTS' CONTENTION THAT RESPONDENTS HAVE FAILED TO PROVE BY COMPETENT EVIDENCE THE ELEMENTS OF THEIR CAUSE OF ACTION IS A MERE EMPTY PLEA SINCE NO AUTHORITY AND NOTHING SPECIFIC IS CITED IN SUPPORT THEREOF.

Appellants claim Respondent's note and mortgage were not identified, offered and admitted in evidence by the trial court. This is not true. Respond-

ent's loan documents consisting of promissory note, deed of trust and title report were identified, offered and admitted in evidence as exhibits by the trial court without objection by Appellants' counsel. These exhibits were in the District Court Clerk's office at the time the record was prepared, but for some reason were inadvertently omitted. They have since been insterted in the record at the request of Respondent's attorney. (R. 74, P. Ex. 1, 2, & 3).

Appellants further claim there is not one word about offering or tendering these exhibits into evidence. This is not true. The exhibits show they were offered and accepted, and the transcript shows testimony regarding the priority of liens of the parties to the foreclosure action as shown by title report. (R. 125). In addition, the transcript shows testimony that Appellants had made no payments on Appellants' loan with Respondent Prudential. (R. 125, 130). Further, the transcript shows testimony on the issue of attorney's fees and cost of title report. (R. 127-131).

In addition to the documentary evidence, Respondent's judgment is based upon testimony appearing in the transcript, admissions and statements of counsel submitted at pretrial, and not contained in the transcript. Findings of Fact and Conclusions of Law were made by the court upon this evidence. The Findings of Fact and Conclusions of Law were served upon Appellants' counsel and no objections were made to them by Appellants' counsel, or motion filed to alter or amend the same under

Rule 52, nor did Appellants' counsel file a motion for a new trial under Rule 59.

Furthermore, when a court of competent jurisdiction has entered a judgment in relation to any subject within its jurisdiction, the presumption arises that it had before it sufficient evidence to authorize it to render such judgment, and that all facts required to be proved to confer jurisdiction were duly proved though the record is silent upon the matter. Moreover, upon collateral attack every presumption is in favor of validity of judgments of courts of general jurisdiction and every fact not negatived by the record is presumed in support of the judgment. *Warren v. Stansbury*, 126 P.2d 251 at 253 (Okla. 1942); *In Re Couch's Estate*, 126 P.2d 994 (Okla. 1942). See also *Thompson v. Short*, 106 P.2d 720 at 726 (Wash. 1940), where the Supreme Court of Washington held, affirming earlier authority, "Every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it." See also *Stafford v. Dickison*, 374 P.2d 665 at 671 (Hawaii 1962), and 30 Am. Jur., Judgments, Sec. 28 et seq.

The rule was perhaps most clearly stated by the Supreme Court of Oklahoma in the case of *Welch v. Focht*, 171 P. 730 at 732 (Okla. 1918), as follows:

> "There is also practical unanimity among the authorities that a judgment of a court of gen-

eral jurisdiction cannot be collaterally attacked, unless the record affirmatively shows want of jurisdiction, and every fact not negatived by the record is presumed in support of the judgment of a court of general jurisdiction, and where the record of the court is silent upon the subject, it must be presumed in support of the proceedings that the court inquired into and found the existence of facts authorizing it to render the judgment which it did." (Citing extensive authority)

It must also be noted that there is a presumption that the judgment of the trial court was correct and every reasonable intendment must be indulged in favor of it; the burden of affirmatively showing error is on the party complaining thereof. *Palfreyman v. Bates & Rogers Construction Co., et al.*, 108 Utah 142, 158 P.2d 132 at 133; *Wheat v. Denver & R. G. W. R. Co.*, 122 Utah 418, 250 P.2d 932 at 935; *Burton v. Zions Cooperative Mercantile Institution*, 122 Utah 360 249 P.2d 514 at 518.

It is therefore abundantly clear that the burden is upon the Appellants to prove that Respondent Prudential failed to prove the material allegations of its complaint and this burden cannot be fulfilled merely by a flat unsupported allegation in their brief.

POINT IV

THERE IS NOTHING IN SECTION 57-1-23, UTAH CODE ANNOTATED 1953 AS AMENDED, WHICH WOULD REQUIRE THE BENEFICIARY WHO ELECTED TO FORECLOSE A TRUST DEED IN THE MANNER

PROVIDED BY LAW FOR THE FORECLOSURE OF A MORTGAGE ON REAL PROPERTY, TO NOTIFY THE CREDITOR OF SUCH ELECTION.

Appellants contend in their brief at page 6 that, "There is no record to indicate how and when that option was exercised prior to filing the complaint, and if so, how the notice of that option was made know (*sic*) to the Appellants," although Appellants concede that such an option exists. There is nothing in Section 57-1-23 which grants this choice to the beneficiary, which requires notice of any kind prior to the commencement of the action. Moreover, under the Utah law governing the foreclosure of mortgages (Sections 78-37-1 et seq, UCA 1953 as amended), there is also no requirement of an advance notice to a defaulting debtor of an intention to foreclose the mortgage. Commencement of the foreclosure action, a proper service of process, and a copy of the complaint were the only notice to which the Appellants were entitled.

In addition, notice in the instant case is completely irrelevant and Appellants' contention of lack of notice is raised for the first time on appeal. It is obvious that Appellants are grasping for straws and that very little is required of Respondents in order to answer such a contention. It may, however, be of interest to the Court to note that the power of sale and the right to foreclose have been held to be concurrent remedies in other jurisdictions; the creditor may proceed with either or both at the same

time (*Carpenter v. Title Ins. & Trust Co.*, 71 Cal. App.2d 593, 163 P.2d 73 (Dist. Ct. App.), *cert. denied*, 328 U.S. 847 (1945), and the institution of one remedy does not preclude the enforcement of the other. *Carpenter v. Title Ins. & Trust Co., supra; Carpenter v. Hamilton*, 59 Cal. App.2d 146, 138 P.2d 353 (Dist. Ct. App. 1943); *McDonald v. Smoke Creek Live Stock Co.*, 209 Cal. 231, 286 Pac. 693 (1930). The Utah statute does not prohibit this procedure. Early Utah cases held that adding the power of sale did not in any way restrict the foreclosure right. *Sidney Stevens Implement Co. v. South Ogden Land, Bldg. & Improvement Co.*, 20 Utah 267, 58 Pac. 843 (1899); *Dupee v. Rose*, 10 Utah 305, 37 Pac. 567 (1894). For a thorough discussion of the Utah Trust Deeds Act, see Note, 8 *Utah Law Review* at 125 et seq.

POINT V

THE TRIAL COURT DID NOT ERR IN ALLOWING COSTS, EXPENSES AND ATTORNEY'S FEES, SINCE SUCH FEES ARE BOTH ALLOWED UNDER UTAH LAW AND ARE JUST IN THE PREMISES.

Appellants in their brief at page 7 contend that Respondent Prudential was limited in the recovery of its fees to the provisions of Section 57-1-31, U.C.A. 1953 as amended. However, a careful reading of this section indicates that the designated limitation on the payment of attorney's fees is applicable only in the limited instance where a defaulting debtor corrects his default prior to the completion of a sale, by power of sale, under a valid trust

deed. This Section is obviously not applicable in the instant case since Appellants neither attempted to correct the default nor was such recourse available to them under the circumstances where the beneficiary elected to foreclose the trust deed as a mortgage. The award of attorney's fees for the presecution of a mortgage foreclosure in Utah is controlled by Section 78-37-9, U.C.A. 1953 as amended, and the trial court's action in the instant case was well in line with statutory authority.

POINT VI

THE COURT DID NOT ERR IN FAILING TO ALLOW THE APPELLANTS A JURY TRIAL.

Appellants' contention that their right to a jury trial was improperly denied is ludicrous under the facts of this case. A demand for jury trial in Utah is governed by the provisions of Rule 38, URCP, and in the complete absence of any attempt by Appellants to make a written demand for a jury trial, and to pay the statutory jury fee, they are barred from raising this contention for the first time on appeal. See *Hamilton et al. v. Salt Lake County Sewerage Improvement District No. 1, et al.*, 15 U.2d 216, 390 P.2d 235; *In Re Woodward*, 14 U.2d 336, 384 P.2d 110; *Tygesen v. Magna Water Co.*, 13 U.2d 397, 375 P.2d 456; *Carson v. Douglas*, 12 U.2d 424, 367 P.2d 462; *North Salt Lake v. St. Joseph Water & Irr. Co., et al.*, 118 Utah 600, 223 P.2d 577; 5 Am. Jur.2d, *Appeal and Error*, Sec. 545 et seq, pp. 29 et seq.

Moreover, the only mention made by Appellants of a jury trial, raised during the pretrial conference, was an oral request by counsel for Appellants that the question of attorney's fees be submitted to a jury. Quite obviously, the question of entitlement to attorney's fees is not a question triable by a jury, but is a clear and simple question of law to be decided by the court. This is made abundantly clear in Sec. 78-37-9, U.C.A. 1953 as amended, which provides in part as follows:

> "In all cases of foreclosure when an attorney's fee is claimed by the plaintiff, *the amount thereof shall be fixed by the court*, any stipulation to the contrary notwithstanding; . . .

See also 37 Am. Jur., *Mortgages*, Secs. 600, 601, pp. 81, 82.

POINT VII

A TRUSTEE IN AN ACTION TO FORECLOSE A DEED OF TRUST AS A MORTGAGE IS A PROPER PARTY PLAINTIFF.

Section 57-1-23, U.C.A. 1953 as amended gives a beneficiary under a deed of trust the option in case of default to either hold a Trustee's sale under a power of sale, or to foreclose the trust deed under the law for the foreclosure of mortgages on real property. The statute does not state whether the trustee or beneficiary named in the trust deed shall bring the action to foreclose and Respondents admit it is arguable that either or both should have the power. The Utah Supreme Court in prior decisions has allowed the beneficiary to bring a foreclosure

action on the ground that the trustee could not assert any right, interest or defense which the beneficiary, the real party in interest, could not make. See *Weir v. Bauer*, 75 Utah 498, 286 Pac. 936 (1930), *Sidney Stevens Implement Co., v. South Ogden Land, Bldg. & Improvement Co.*, supra, *Dupee v. Rose*, supra. Even though these cases hold the beneficiary shall bring the action to foreclose, they do not hold the trustee is not a proper party.

There are decisions from other states that hold that where the beneficiary could not practicably bring the action, as where the beneficiaries are too numerous, the trustees should be allowed to bring the foreclosure action. See *e.g. Barkhausen v. Continental Ill. Nat'l Bank & Trust Co.*, 351 Ill. App. 388, 115 N.E.2d 640 (1953), *White v. MacQueen*, 360 Ill. 236, 243, 195 N.E. 832, 835 (1935).

The California Trust Deed Law which served as a pattern for the Utah Deed of Trust Law specifically allows either the beneficiary or the trustee to bring the foreclosure action. (Calif. Code Civ. Proc., Sec. 725 (a), 34 Cal. Jur. 2d 171 et seq.)

From the foregoing authorities, Respondents contend that the trustee is *not a necessary party* plaintiff to bring the foreclosure action; however, the trustee *is a proper party plaintiff*, and in no event should a judgment of foreclosure be reversed because the trustee and benficiary file the action as co-plaintiffs.

Security Title Company was named defendant in Respondent's complaint because it was the assignee of judgment against the Appellants in favor of Pioneer Wholesale Supply Co. (R. 74 P. Ex. 3) Said judgment constituted a lien against the mortgaged premises, which had to be cleared from the title to the premises through foreclosure. Said judgment has been satisfied since the commencement of the foreclosure action and simultaneously with the filing of this brief, Security Title Company has filed with this Court a disclaimer, whereby it disclaimed any interest in and to the property which is the subject matter of this foreclosure action. The contention of Appellants that Security Title Company appears both as plaintiff and as a defendant is therefore moot.

POINT VIII

APPELLANTS' CLAIM THAT ELLIS J. ROBINSON AND ELIZA ANN ROBINSON AFFIXED THEIR SIGNATURES TO THE PROMISSORY NOTE AS ACCOMMODATION MAKERS WAS NOT RAISED IN THE PLEADINGS OR AT PRETRIAL AND CANNOT BE RAISED FOR FIRST TIME ON APPEAL.

The promissory note shows the personal endorsements of Ellis J. Robinson and Eliza Ann Robinson as co-makers (R. 74, P. Ex. 2), which fact Appellants admit in the Seventh Defense in their Answer. (R. 26, 27). No claim was made by Appellants in their pleadings or at the pretrial conference that Ellis J. Robinson and Eliza Ann Robinson executed the promissory note as accommodation

makers. Their claim cannot be brought before this Court for the first time on appeal. (See cases cited under Point VI supra.)

As further argument against Appellants' claim on this point, an examination of the Sheriff's Return of Sale shows Respondent Prudential has been paid in full for its judgment of foreclosure and that Respondent Prudential has no deficiency judgment against any of the Appellants. Moreover, Respondents now make no claim of deficiency judgment against them. Therefore, the claim of Appellants that Ellis J. Robinson and Eliza Ann Robinson have been released from liability from Respondents' judgment because of the claimed waivers becomes a moot question.

POINT IX

THE BURDEN OF PROVING ERROR MAY NOT BE SHIFTED ON APPEAL FROM APPELLANT TO RESPONDENT AND REVIEWING COURT CANNOT BE EXPECTED TO PROSECUTE INDEPENDENT INQUIRY TO FIND REASONS FOR OR AGAINST RULINGS OF TRIAL COURT, BUT IT IS DUTY OF COUNSEL FOR APPELLANT, BY CITATION OF AUTHORITIES AND BY ARGUMENT, TO SHOW COURT IN WHAT MANNER RULINGS COMPLAINED OF ARE ERRONEOUS.

This court speaking through then District Judge Crockett stated in the case of *Palfreyman v. Bates & Rogers Construction Co., et al,* 108 Utah 142, 158 P.2d 132 at 133:

"We are favored with no citation of author-

> ity in the appellant's brief. This court does not look with favor upon the cause of a litigant who raises points and casts them in the lap of the court for research and determination, and if this is done, it is within the discretion of the court to refuse to consider them." (Citing authorities)

See also *Arnold v. Splendid Bakery*, 401 P.2d 271 at 277 (Idaho 1965); *Williams v. DeLay*, 95 P.2d 839 (Alaska 1964); *Weaver v. Sibbett*, 393 P.2d 601 (Idaho 1964); *Reed v. State Election Board*, 369 P.2d 156 (Okla. 1962); and *McDaniel v. McDaniel*, 391 P.2d 191 (Wash. 1964).

CONCLUSION

It is respecfully submitted that Appellants' appeal should be dismissed and the judgment of the trial court affirmed on the ground that:

(1) The only genuine issue between the Appellants and Respondents is attorney's fees claimed by Respondents in their complaint and allowed by the trial court in the sum of $2,500. Respondent Prudential has consumated a sale of the mortgaged premises for $34,000 upon the condition that the Respondent's judgment and the Sheriff's sale are affirmed by this Court. If the attorney's fees allowed to the Respondent are cancelled by this Court, Respondent's judgment will be reduced to the sum of $30,579.15, and Appellants will realize the net difference between Respondent's judgment and the option sales price, or the sum of $3,430.85, (less a

real estate commission); despite the fact that Appellants have paid nothing on Respondent Prudential's loan.

(2) The law applicable to each point raised by the Appellants is against Appellants and in favor of the Respondents;

(3) A review of the record in this case shows that counsel for Appellants has done everything within his power to obstruct the orderly prosecution of this foreclosure action in the trial court and this Court by the filing of dilatory motions and by his failure to abide by the rules fixed by this Court governing appellate procedure, which all members of the Bar are bound to uphold; and

(4) Appellants fail to cite one text or one case authority in support of their contentions, as set forth in their brief, to assist this Court in its determination of this Appeal.

Respectfully submitted,

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